FILE COPY

APR 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1161

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, As Solicitor General of the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, As Solicitor General of the Criminal Court of Fulton County, Georgia,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

THOMAS R. MORAN, ESQ.
Room 53
Criminal Court of
Fulton County
160 Pryor Street, S.W.
Atlanta, Georgia 30303

Counsel for Respondents

INDEX

	Page
PART ONE	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	3
PART TWO	6
ARGUMENT AND CITATION OF AUTHORITY	7
REASONS FOR NOT GRANTING THE WRIT	7
A. Construction of State obscenity statutes by the various state courts in light of the new standards set forth in Miller v. California and its companion cases has been uniform and correct	7

QUESTIONS PRESENTED

1. Whether the Georgia obscenity statute (Ga. Code Ann. 26-2101) was properly construed by the Georgia Supreme Court upon remand 7
2. Whether the Georgia Supreme Court properly applied the Georgia Obscenity Statute to petitioner's conduct upon remand 2
3. Whether the two (2) motion picture films which are the subject matter of these proceedings, and determined by the Supreme Court of Georgia to be obscene, are obscene in the Constitutional sense and are therefore not protected expression under the First Amendment of the United States Constitution 2

INDEX—Continued

Page

CONCLUSION 21
CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Basilone v. Florida, 286 So. 2d 616 (1973) 15
Bouie v. Columbia, 378 U.S. 347 (1964) 19
Burgin v. South Carolina, 255 S.C. 237, 178 SE 2d 325, reversed 404 U.S. 806 (1971) 19
Chobot v. Circuit Court for Milwaukee City, 212 N.W. 2d 690 (1973) 8, 10, 19
Cox v. New Hampshire, 312 U.S. 569 (1941) 19
Ebert v. Maryland Board of Censors, 313 A. 2d 536 (1973) 10
Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 SE 2d 712 (1971) 11, 20
Gibbs v. State, 504 SW 2d 719 (1974) 8
Gornto v. State, 227 Ga. 46, 178 SE 2d 894 (1970) 11
Hamar Theatres, Inc. v. Cryon, 365 F. Supp. 1312 (D.N.J. 1973) 10, 15
Louisiana v. Gay Times Inc., 274 So. 2d 162 (1973) 15
Louisiana v. Shreveport News Agency, Inc., 287 So. 2d 464 (1974) 10, 15
Mahney v. Indiana, 300 N.E. 2d 66 (1973) 10, 15
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 6
Miller v. California, 413 U.S. 15 (1973) 5, 12, 17
Papp v. Florida, 281 So. 2d 600 (1973) 10
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) 5, 10, 17, 19
People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) 10, 12, 16, 18

TABLE OF AUTHORITIES—Continued

Page

Price v. Commonwealth, 201 S.E. 2d 798 (1974) 10, 13, 16
Rabe v. State, 405 U.S. 313 (1972) 19
Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 69 (1973) 15
Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 697 (1973) 8, 10
Richards v. Texas, 497 S.W. 2d 770 (1973) 10
Rhodes v. Florida, 283 So. 2d 351 (1973) 10, 14
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 19
Slaton v. Paris Adult Theatre, 228 Ga. 343, 185 SE 2d 768 (1971) 5, 16, 20
State v. Bryant, 201 SE 2d 211 (1973) 10, 16, 18
State v. Eros Cinema, Inc., 262 La. 706, 264 So. 2d 615 (1972) 17
State v. Rasheed, 248 La. 309, 178 So. 2d 261, cert. den. 384 U.S. 1012 (1965) 17
State v. Vixen, 35 Ohio St. 2d 215, 301 NE 2d 880 (1973) 10, 14
State v. Wedelstedt, 213 N.W. 2d 652 (1973) 10, 16
State v. J - R Distributors, Inc., 82 Wash. 2d 584, 512 P. 2d 1049 (1973) 15
Stroud v. Indiana, 300 NE 2d 100 (1973) 10, 15
United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Oka. 1973) 10
U.S. v. Lang, 361 F. Supp. 380 (C.D. Calif. 1973) 10
U.S. v. Millican, 487 F. 2d 331 (5th Cir. 1973) 10, 18
U.S. v. 12-200 Ft. Reels, 413 U.S. 123 (1973) 9
U.S. v. 1 Reel of Film, 481 F. 2d 206 (1st Cir. 1973) 18

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Thevis, 484 F. 2d 1149 (5th Cir. 1973) 10, 17, 18, 20

Walter v. Slaton, 227 Ga. 676, 182 SE 2d 464 (1971) 8, 11

1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1971) 8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1161

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PART I

Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, Respondents, pray that the Application for Writ of Certiorari to the Supreme Court

of Georgia to review the judgment entered in this case on October 30, 1973, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 231 Ga. 312; 201 S.E. 2d 456 (1973). It is also set out as "Exhibit B" in Petitioner's Petition for Writ of Certiorari, Appendix, Volume I.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the Georgia obscenity statute (Ga. Code Ann. 26-2101) was properly construed by the Georgia Supreme Court upon remand.

2. Whether the Georgia Supreme Court properly applied the Georgia Obscenity Statute to petitioner's conduct upon remand.

3. Whether the two (2) motion picture films which are the subject matter of these proceedings, and determined by the Supreme Court of Georgia to be obscene, are obscene in the Constitutional sense and are therefore not protected expression under the First Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the constitutional and statutory provisions set forth in Appendix "C" of the Petition for Certiorari, Appendix, Volume I.

STATEMENT OF THE FACTS

On December 28, 1970, Lewis R. Slaton as District Attorney of the Atlanta Judicial Circuit and Hinson McAuliffe as Solicitor General of the Criminal Court of Fulton County filed separate complaints in the Superior Court of Fulton County against Paris Adult Theatre I and II and named individuals praying for a rule nisi to require the defendants to show cause on a day certain why the motion picture films "It All Comes Out In The End" and "Magic Mirror" should not be declared obscene and subject to be seized and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same.

A temporary injunction was granted ex parte by the local trial court restraining the defendants from destroying the films or removing them from the jurisdiction of the Court. The rule nisi was duly issued and served in each case and an adversary hearing was held pursuant thereto on January 13, 1971, before a Judge of the Superior Court of Fulton County. The parties agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the trial judge would be the Final Judgment and Order in each case.

The two (2) films were exhibited to the trial court. The only other state evidence was testimony by the criminal investigators that they had paid admission to see the films and that nothing on the outside of the theatre indicated the full nature of what was shown. In particular nothing indicated that the films depicted—as they did—

scenes of simulated fellatio, cunnilingus and group sex intercourse.

After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment.

> " 'The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, 'It All Comes Out In The End,' and 'Magic Mirror.' Assuming that obscenity is established by a find that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occuring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.
>
> "It appears to the court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.
>
> "It is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.
>
> "The actions against the defendants, therefore, are dismissed.

"This 12th day of April, 1971

Jack Etheridge, Judge,
Superior Court of Fulton
County,
Atlanta Judicial Circuit."

On appeal from this order, the Georgia Supreme Court unanimously reversed the judgment of the trial court holding that the said films are hard-core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the First Amendment. *Slaton v. Paris Adult Theatre,* 228 Ga. 343, 185 S.E. 2d 768 (1971).

This court granted Certiorari on June 26, 1972, and thereafter on June 21, 1973, vacated the judgment of the Georgia Supreme Court and remanded the case for further proceedings not inconsistent with the opinion rendered in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); and U.S. v. 12,200 Ft. Reels of Super 8 mm film etal, 413 U.S. 123 (1973). This court denied a petition for rehearing in this case on October 9, 1973.

Pursuant to this court's remand, on October 30, 1973, the Georgia Supreme Court construed Georgia Code Ann. 26-2101 in light of prior Georgia cases and *Miller v. California;* thereby, affirming the earlier decision of Slaton v. Paris Adult Theatre I, 228 Ga. 343, 185 S.E. 2d 768 (1971).

The Supreme Court of Georgia held that in the past it had defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as suggested by this court in *Miller v.*

California and that these definitions were part of the statute before the acts of petitioner which formed the basis of the injunction.

The Supreme Court of Georgia also held that the "utterly without social redeeming value test" existing in the Georgia statute placed a greater burden to the state than the new standard of *Miller* and the pre-*Miller* social value test was to be applied to the petitioner. In addition the court construed the Georgia statute to include the new test "serious literary, artistic, political or scientific value, but the state still had to prove both the Memoirs v. Massachusetts, 383 U.S. 413 (1966) test and the new *Miller* test.

And, finally the court held that State standards were the standards of the State of Georgia and that the films were obscene under that standard.

A petition for certiorari to the Supreme Court of Georgia was filed with this court on January 28, 1974.

PART TWO

CONSTRUCTION OF STATE OBSCENITY STATUTES BY THE VARIOUS STATE COURTS IN LIGHT OF THE NEW STANDARDS SET FORTH IN MILLER V. CALIFORNIA AND ITS COMPANION CASES HAS BEEN UNIFORM AND CORRECT.

1. WHETHER THE GEORGIA OBSCENITY STATUTE (GA. CODE ANN. 26-2101) WAS PROPERLY CONSTRUED BY THE GEORGIA SUPREME COURT UPON REMAND.

The Georgia obscenity statute reads as follows:

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents of the subject matter; if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially

beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000 or both. (Acts 1968, pp. 1249, 1302; 1971, p. 344.)

The Georgia obscenity law is a criminal statute, however, it is used as the test for obscenity in civil cases. *See* Walter v. Slaton, 227 Ga. 676, 182 SE 2d 464 (1971); 1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1971).

It is settled law that courts may interpret statutory language so as to preserve the validity of the statute Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 697 (1973). A court has a duty to uphold a statute if it can—Chobot v. Circuit Court for Milwaukee City, 212 NW 2d 690 (1973); Gibbs v. State 504 SW 2d 719 (1973). Support for the proposition that a state court may now construe a statute to comport with the *Miller* formulation may be found in *Miller* itself.

"We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing statutes as construed heretofore or hereafter, may well be adequate. Miller v. Calif., 413 U.S. 49, _____

Consequently, *Miller* did not reverse the lower court but vacated and remanded for further proceedings. This mandate appears in all the *Miller* companion cases. Significantly at the end of each opinion, where the remand court is directed to conduct further proceedings not inconsistent with the First Amendment standards established by *Miller*, this Court cites United States v. 12-200 Ft. Reels, 413 U.S. 123 N7 which says:

"We further note that, while we must leave to state courts the construction of State legislation, we do have a duty to authoritatively construe federal statutes . . . if and when such a serious doubt is raised as the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent' or 'immoral' as used to describe regulated material in 19 U.S.C. 1305 (a) and 18 U.S.C. 1462 . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California . . . Of course Congress could always define other specific 'hard core' conduct.

Also, this Court recognized that the Georgia Supreme Court could construe the Georgia statute to comport with the *Miller* test in the instant case.

In the opinion rendered by this Court in the instant case it was said "in light of these holdings, nothing precludes the State of Georgia from regulation of the allegedly ob-

scene materials . . . provided that the applicable Georgia laws as written or authoritatively interpreted by the Georgia courts meets the first amendment standards set forth in *Miller* v. *California*. Paris Adult Theatre v. Slaton, 413 US. 49 _____

Therefore on remand from this court the Supreme Court of Georgia construed the Georgia obscenity statute in light of *Miller v. California* and its companion cases. In doing so it followed a majority of the state courts which have passed upon the question. State v. Vixen, 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973); Rhodes v. Florida, 283 So. 2d 351 (1973); Redlich v. Capri Cinema, Inc., 349 N.Y.S. 2d 697 (1973); Gibbs v. State, 504 S.W. 2d 719 (1974); Chobot v. Circuit Ct. for Milwaukee Cty., 212 N.W. 2d 690 (1973); State v. Bryant, 201 S.E. 2d 211 (1973); People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973); Price v. Commonwealth, 201 SE 2d 798 (1974). *See* Richards v. Texas, 497 S.W. 2d 770 (1973). *But See* Papp v. Florida, 281 So. 2d 600 (1973); State v. Wedelstedt, 213 N.W. 2d 652 (1973); Mahney v. Indiana, 300 N.E. 2d 66 (1973); Stroud v. Indiana, 300 NE 2d 100 (1973); Louisiana v. Shreveport News Agency Inc., 287 So. 2d 464 (1974).

However, virtually all courts have agreed that *Miller v. California* and its companion cases did not repeal all state statutes dealing with obscenity. *See* in addition to the citations heretofore, Ebert v. Maryland Board of Censors, 313 A. 2d 536 (1973); United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Oka. 1973); U.S. v. Thevis, 484 F. 2d 1149 (5th Cir. 1973); U.S. v. Millican, 487 F. 2d 331 (5th Cir. 1973). *But See* U.S. v. Lang, 361 F. Supp. 380 (C.D. Calif. 1973). Hamar Theatres Inc. v. Cryon, 365 F. Supp. 1312 (D.N.J. 1973).

Miller v. California specially held that it did not require a state to enact new obscenity laws but that existing state statutes "as construed heretofore or hereafter may well be adequate.

Therefore the Georgia Supreme Court was correct in construing the Georgia obscenity statute in light of prior constructions, and the words of the statute itself.

The Georgia Supreme Court had authoritatively construed the statute to define specific proscribed sexual conduct. In Gornto v. State, 227 Ga. 46, 178 SE 2d 894 (1970), the Georgia Supreme Court held that the statute proscribed closeups of unclothed genitalia, acts of homosexuality, sadism and masochism, masturbation, sodomy, beastiality, and sexual intercourse. In Evans Theatre v. Slaton, 227 Ga. 377, 180 SE 2d 712 (1971), the court held the statute encompassed "numerous acts of sexual intercourse, natural, unnatural, bizarre and violent. Likewise in Walter v. Slaton, 227 Ga. 676, 182 SE 2d 464 (1971) the court held that actual sexual activity both natural and unnatural of the most salacious character come within the statute. See 1024 Peachtree Corp. v. Slaton, 228 Ga. 102, 184 SE 2d 144 (1971). These decisions are interpretations of the phrase "shameful or morbid interest in nudity, sex or excretion" found in the Georgia statute. Indeed under a fair reading of these cases they announce a rule limiting the relevant Georgia Code sections along lines almost identical to the suggested examples of prohibited conduct in the *Miller* opinion.

> "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . Patently offensive representations or

> descriptions of masturbation, excretory functions and lewd exhibition of the genitals." Miller v. California, 413 U.S. 15, _____ (1973).

The patently offensive test is expressly present in the statute.

> ". . . if in addition it goes substantially beyond customary limits of candor in describing or representing such matters, Ga. Code Ann. 26-2101 (b)"

Other state courts have held that prior constructions limited these statutes to specifically defined sexual conduct.

In People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), the California Court of Appeals held that their obscenity statute has been limited to specific sexual conduct by prior decisions. The California penal code involved (Cal. Penal Code 311.2) is almost identical to the Georgia statute.[1] The court said:

> "Previous California cases have so limited section 311. Thus, it is clear that section 311 prohibits only "hard core pornography" (Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152) that nudity does not equate with obscenity and that "no matter how ugly or repulsive the presenta-

---

[1] Section 311.2 provides in relevant part, "Obscene matter means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e. a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance. . . ."

tion, we are not to hold nudity, absent a sexual activity, to be obscene" (People v. Noroff, 67 Cal. 2d 791 at 797, 63 Cal. Rptr. 575 at 579, 433 P.2d 479 at 483), and that "To constitute obscenity . . . the material must contain a graphic description of sexual activity" (People v. Cimber, 271 Cal. App. 2d Sup. 867, 869, 76 Cal. Rptr. 382, 383). Further, and with respect to material of similar character to that involved here, Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 stated with reference to a film depicting, among other things, fellatio, sodomy and oral copulation that "It should be readily apparent from the preceding description that the film goes far beyond customary limits of candor in offensively depicting certain unorthodox sexual practices and relationships. . . . (245 C.A. 2d at 826, 54 Cal. Rptr. at 181). The film was held to be obscene with the meaning of section 311. Miller thus has not imposed any new requirements upon California law insofar as two of the three elements required by section 311 are involved. People v. Enskat 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, 439 (1973).

In Price v. Commonwealth, 201 SE 2d 798 (1974), the Virginia Supreme Court on remand from this Court (413 U.S. 912 1973) held that the Virginia statute[2] had been previously construed to define the sexual conduct prohibited. The court said:

"We have narrowed this definition by judicial construction, In House v. Commonwealth, 210 Va. 121, 127, 169 S.E. 2d 572, 577 (1969), we reversed an

[2] Vig. Code 318.1-227.

obscenity conviction involving a magazine which featured pictures of nude and partially clothed men and women. There we held that a portrayal of nudity is not, as a matter of law, a sufficient basis for a finding that a work is obscene. See also Upton v. Commonwealth, 211 Va. 445, 447, 177 S.E. 2d 528, 530 (197). Thus, the Virginia obscenity law under which Price was convicted limits the class of works which might be found obscene to portrayals of sexual activity or excretion, not including mere nudity, which go beyond the customary limits of candor in representing such matters.

(2) We conclude that the Virginia obscenity statute, as construed, prohibits only hard core pornography such as the examples delineated in Miller and does not restrict constitutionally protected speech and writing. We do not believe that the Miller examples were intended to preempt or standardize state obscenity statutes, for the Supreme Court emphasized that it was not the court's function to propose regulatory schemes for the states. 413 U.S. at 25, 93 S.Ct. 2607. Consequently, we hold that our obscenity law is not valid for overbreadth. Price v. Commonwealth, 201 SE 2d 798, 800 (1974)."

In State v. Vixen, 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973), an action to abate a film as a nusiance, the Supreme Court of Ohio on remand from this court held that the Ohio obscenity statutes, construed together, defined the prohibited conduct.

In Rhodes v. Florida, So. 283 2d 351 (1974) the Supreme Court of Florida held that these statutes had been construed to include the prohibited conduct. See

also State v. J - R Distributors Inc., 82 Wash. 2d 584, 512 P. 2d 1049 (1973); Redlich v. Capri Cinema Inc., 349 N.Y.S. 2d 69 (1973); Basilone v. Florida, 286 So. 2d 616 (1974) per curiam denial of certiorari, Mager J. concurring.

And some state courts, while recognizing a construction was possible have held that there respective statutes have not been construed to define prohibited acts or that statutes were too general to be construed to comport with *Miller*.

In Hamar Theatres Inc. v. Cryon, 365 F. Supp. 1312 (D.N.J. 1973), pornographers challenged the New Jersey anti-obscenity statute. The district court held the statute unconstitutional in light of *Miller*. The statute contained only the prurient interest test of *Roth* and nothing more. To construe the statute to comport with *Miller* the court would have to add two parts of the three prong definition specifically left out by the New Jersey legislature. *See* also Mahney v. Indiana, 300 N.E. 2d 66 (1973); Stroud v. Indiana, 300 N.E. 2d 100 (1973).

In Louisiana v. Shreveport News Agency, Inc., 287 So. 2d 464 (1974) the Louisiana Supreme Court held that the Louisiana obscenity statute could not be construed to comport with Miller. The statute used the terms "lewd, lascivious" to refer to obscene material and had recently been construed to comport to *Roth*. (Louisiana v. Gay Times, Inc., 274 So. 2d 162 (1973). Although recognizing that "the adoption of federal constitutional standards in the interpretation and enforcement of state statutes is an accepted judicial practice," the court felt the statute would require legislative, not judicial action to save it in that it was so general in its terms.

Similarly, in the case of State v. Wedelstedt, 213 N.W. 2d 652 (1972) the Iowa Supreme Court in a criminal case held that the Iowa obscenity statute which used the phrase "corruption of the morals of youth or others" and which had never been authoritatively construed was vague and overbroad in light of *Miller*.

The Georgia Supreme Court applied the *Memoirs* test to the material in this case and construed the statute to include both the *Memoirs* test and the *Miller* test so that now the state must show that the material

1. is utterly without social redeeming value; and,

2. the material lacks serious literary, artistic, political or scientific value. The court found the material involved here to be utterly without social redeeming value. Slaton v. Paris Adult Theatre, 228 Ga. 343, 185 SE 2d 768 (1971) which by necessity requires that the material lack serious literary, artistic, political or scientific value. Price v. Commonwealth, 201 SE 2d 798, 801 (1974) because part (c) of the *Miller* test is broader and less rigorous than the Memoirs test. See People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr 433 (1973). State v. Bryant, 201 SE 2d 211 (1973).

The Georgia Court could not read the Memoirs test out of the statute because to do so would invade the province of the legislature and thus violate separation of powers principles.

This court nowhere held that the "utterly without social redeeming value" test is itself unconstitutional. This court said:

> "we do not adopt as a constitutional standard the 'utterly without redeeming social value' test as Mem-

> oirs. . . ." We also reject, as a constitutional standard, the ambiguous concept of 'social importance'. . . ." Miller v. California, 413 U.S. 15, _____ N.7.

This court stated that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law" Miller v. California, 413 U.S. 15 _____ (1973). The Memoirs test was rejected, not because it permitted an unconstitutional infringement on efforts to distribute pornography, but rather because it imposed greater burden on the regulation of such materials than was demanded by the constitution. Miller v. California, 413 U.S. 15 (1973); U.S. v. Thevis, 484 F. 2d 1149, 1154 (5th Cir. 1973).

There is no reason why state law cannot impose more strict requirements on the prosecution as to the definitions of obscenity than the constitution would require. That, in effect is what the "utterly without redeeming social value" formulation does. In Paris Adult Theatre v. Slaton, 473 U.S. 49 (1973) this court said:

> "It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material . . ."

Paris Adult Theatre v. Slaton, 413 U.S. 49 _____ (1973). To add the *Miller* social value formulation to the Georgia statute simply adopts constitutional standards to the enforcement of state statutes—an accepted judicial practice State v. Eros Cinema Inc., 262 La. 706, 264 So. 2d 615 (1972); State v. Rasheed, 248 La. 309, 178 So. 2d 261, cert. den. 384 U.S. 1012 (1965). If petitioners proposition, that the Georgia court could not adopt the

Miller social value, were true; this court in the interest of strengthening powers to regulate pornography, would be eliminating constitutionally valid law that would otherwise be available in prosecuting obscenity cases. See State v. Bryant, 201 SE 2d 211 (1973).

II WHETHER THE GEORGIA SUPREME COURT PROPERLY APPLIED THE GEORGIA OBSCENITY STATUTE TO THE CONDUCT OF PETITIONER UPON REMAND.

The Supreme Court of Georgia construed the Georgia obscenity statute to include both the *Miller* and *Memoirs* social value formulation. The *Memoirs* test included greater protections to free speech and depression and was fully applicable to pre-*Miller* defendants. See U.S. v. Thevis 484 F 2d 1149 (5th Cir. 1973). U.S. v. 1 Reel of Film, 481 F. 2d 206 (1st Cir. 1973). This court's decision in *Miller* does not require reversal of state obscenity convictions under laws that define obscenity at least as narrowly as *Miller*. People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). Petitioner got the benefit of *Memoirs* and *Miller*. This dual procedure protected petitioner from retroactive application of *Miller* standards which might ease the burden of the state. At the same time it granted petitioner the application of *Miller* standards which might place a heavier burden upon the State. State v. Bryant, 201 SE 2d 211 (1973). U.S. v. Millican, 487 F. 2d 331 (5th Cir. 1973).

There has been no judicial enlargement of a statute by the Georgia Supreme Court, much less a retroactive application. Nor has there been an unconstitutional narrowing of an overly broad statute to save retroactively its

application to a criminal defendant. Therefore, the cases of Rabe v. State, 405 U.S. 313 (1972) and Bouie v. Columbia, 378 U.S. 347 (1964) are not in point. This is a civil case where the statute has a judicial loss limiting its definitional provisions prior to petitioner's conduct. *Compare* Cox v. New Hampshire, 312 U.S. 569, 577 (1941) *with* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). *See* Chobot v. Circuit Court for Milwaukee City, 212 N.W. 2d 690 (1973).

There can be no serious question that the situation of the petitioners have not been substantially altered by the application of the standards of *Miller* already prevailing in Georgia under statutory and decisional law.

WHETHER THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

The two films involved in the instant case have been before this Court before. Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973). "Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method known to man and are clearly and easily distinguishable from material involved in cases such as Burgin v. South Carolina, 255 S.C. 237 178 SE 2d 325, *reversed* 404 U.S. 806 (1971) and other cases reversed by this court citing Redrup as authority: The films were found to have violated the *Roth* Memoirs test prevailing in Georgia at the time of trial. Slaton v. Paris Adult

Theatre, 228 Ga. 343, 185 SE 2d 768 (1971). Therefore, the films were shown to be utterly without social redeeming value and to have contained conduct as described in the prior Georgia cases such as Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 SE 2d 712 (1971) and 1024 Peachtree Corporation v. Slaton, 228 Ga. 102 184 SE 2d 144 (1971) (actual sexual activity, both natural, unnatural, bizarre and violent including sexual intercourse, fellatio and cunnilingus.)

If material is utterly without social redeeming value it must necessarily lack serious literary, artistic, political or scientific value. The films are obscene under both the *Roth-Memoirs* test and the new *Miller* test. *See* U.S. v. Thevis, 484 F. 2d 1149 (5th Cir. 1973).

CONCLUSION

For the foregoing reasons, the construction of state obscenity statutes by the various state courts in light of *Miller v. California* has been uniform and correct. The Georgia Supreme Court properly construed Georgia Code Ann. 26-2101 in light of *Miller v. California* and properly applied it to the petitioner herein. The films here involved are not protected by the First Amendment and are obscene under both the *Roth-Memoirs* and *Miller* formulations.

Respectfully submitted,

/s/THOMAS R. MORAN
Assistant Solicitor
Criminal Court of
Fulton County
Civil Criminal Court
Building
Atlanta, Georgia 30303